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# United States Senate

WASHINGTON, DC 20510-4402

June 25, 2010

## COMMITTEES:

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ON TAXATION

The Honorable Charles F. Bolden, Jr.  
Administrator  
National Aeronautics and Space Administration  
Washington, DC 20546

Dear Administrator Bolden:

We are greatly disappointed by your decision to curtail funding for Project Constellation during this fiscal year. The 2010 Consolidated Appropriations Act is clear. The National Aeronautics and Space Administration ("NASA") is prohibited from using funds this fiscal year to "terminate or eliminate" Project Constellation. Accordingly, we call upon NASA to rectify this situation by ensuring the Agency's policies return to compliance with the 2010 Consolidated Appropriations Act.

Throughout the debate on the future of manned space flight, you stated on multiple occasions NASA would comply with the provisions of the 2010 Consolidated Appropriations Act. As you know, that statute prohibits the use of funds for the "termination or elimination of any program, project or activity of the architecture for the Constellation program nor shall such funds be available to create or initiate a new program, project or activity, unless such program termination, elimination, creation, or initiation is provided in subsequent appropriations Acts." The intent of this law is straightforward and unequivocal. NASA is to continue funding Project Constellation for the duration of this fiscal year. Congress specifically adopted this language to ensure a thorough analysis of our manned space program before taking additional appropriate legislative action.

The effect of NASA's action will cause the production and development work of Project Constellation to be greatly reduced, if not eliminated, four months before the end of this fiscal year. As a result, many corporations working on Project Constellation will be unable to sustain their workforces and thousands of jobs will be lost before Congress can complete the legislative process. Therefore, the effect of NASA's action will be the de facto elimination of Project Constellation before the end of fiscal year. This violates the intent of Congress.

In addition, NASA's argument that it must curtail Project Constellation funding because of the Anti-Deficiency Act is specious. NASA claims Project Constellation's contractors have created a \$911 million accounting shortfall since they have not allocated funds for termination liability costs. Yet, it has been NASA's decades-long practice to instruct contractors not to set aside funds for termination. In fact, if NASA continues to use its historic accounting method and practices there will not be a shortfall.

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Regardless, NASA's argument for corrective action under of the Anti-Deficiency Act is based on an erroneous assertion. The Agency incorrectly claims it is unable to provide additional funds to cover termination liability due to restrictions associated with the Anti-Deficiency Act. In fact, the Limitation of Funds clause ("LOF") is not an Anti-Deficiency Act requirement, but rather a contract administration rule which provides numerous options to the Contracting Officer – including the option to allocate additional funds to the contract. A Federal Court has previously rejected government arguments that the LOF clause is a strict Anti-Deficiency Act requirement and even stated the "government may not hide behind the Anti-Deficiency Act when there is a binding obligation to pay and the government has general appropriations sufficient to cover the contractual obligation." (See *Viacom, Inc. v. United States*, 70 Fed.Cl.649, 657 (2006), citing *Cherokee Nation of Okla. V. Leavitt*, 543 U.S. 631, 637-38 (2005)).

An additional concern is this new requirement does not appear to affect other NASA contracts. We are extremely concerned about the inconsistent treatment and the counter-productive effect of withholding funding from the performance of critical work on NASA contracts.

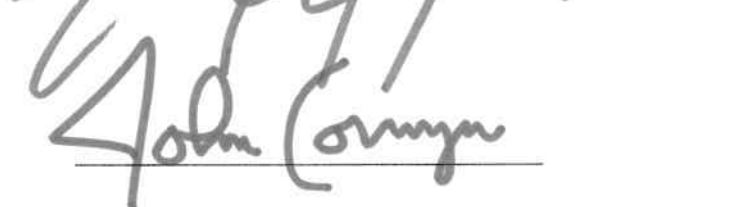
In conclusion, NASA's recent action is not based on administrative practice or statutory requirement. It clearly violates the intent and specific language of the 2010 Consolidated Appropriations Act. Accordingly, we call upon NASA to rectify this situation by ensuring NASA's policies return to compliance with the 2010 Consolidated Appropriations Act.

Yours truly,

  
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